Supreme Court, U.S.
FILED

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No.

IN THE

# Supreme Court of the United States

NEUNG KANG, AN INDIVIDUAL, PETITIONER

*v.*

PB FASTENERS, A CORPORATION
DOING BUSINESS IN CALIFORNIA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether the use of the term "stupid Korean" by an employment decisionmaker constitutes direct evidence of discrimination warranting a finding that the employer's rationale for an adverse employment consequence was pretextual?

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## OPINIONS BELOW

The February 27, 2008 opinion of the Ninth Circuit Court of Appeals (Pregerson, H., Wardlaw, K., and Archer, G.), which is not officially reported, is unofficially reported at 2008 U.S. App. LEXIS 4694; 27 I.E.R. Cas. (BNA) 503 and is set out at pp. 1a-7a of the Appendix. The April 15, 2008 order of the court of appeals denying rehearing, which is not officially reported, is set out at p. 26a of the Appendix.

The May 22, 2006 memorandum decision of the district court, which is not offically reported, is set out at pp. 8a-25a.

## JURISDICTION

The decision of the court of appeals was entered on February 27, 2008. A timely petition for rehearing was denied on April 15, 2008. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## RELEVANT PROVISIONS INVOLVED

42 U.S.C. §1981 provides in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts...as is enjoyed by white citizens....
>
> (b) For the purpose of ths section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

## STATEMENT

This case arises under 42 U.S.C. §1981. District Court jurisdiction is pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). The District Court also assumed jurisdiction over the California contract claims because the violations of federal law alleged predominated the Complaint for Civil Damages and the state claims were based on the same nucleus of operative facts. Judicial economy, convenience and fairness to the parties resulted from the exercise of the District Court's jurisdiction over the alleged violations of California law. 28 U.S.C. §1367(a).

Appellate jurisdiction over this action is pursuant to 28 U.S.C. § 1291(b) and Rule 4(a) of the Federal Rules of Appellate Procedure. This appeal is taken from a final order of judgment, a judgment that disposed of all of Petitioner's claims.

The District Court's Order granting the motion for summary judgment was filed on May 22, 2006 and entered on May 23, 2006 [Excerpts of Record[1] ("hereinafter ER"), Tab 18]. The District Court executed and filed the final judgment, dismissing Petitioner-Appellant's claims, on May 24, 2006 [ER, Tab 20]. Petitioner timely filed a notice of appeal and perfected the appeal on June 22, 2006 [ER, Tab 23].

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[1] References to the court of appeals record are included throughout this Petition as Excerpts of Record, or "ER."

*A. From 1975 to the Date of his Termination, Petitioner Performed the Lead Worker Functions, Particularly the Audits, Which Are Attributed to Lira.*

Herber testified that Kang never served as a lead worker. [ER, Tab 11, Exhibit 30, Herber Depo. 100:8-13] Herber believed Kang lacked English skills to serve as day shift lead worker. [ER, Tab 11, Exhibit 30, Herber Depo. 100:17-25] Herber further testified that he was aware of approximately 10 audits, conducted over the course of 5 years, while he was Director of Quality Engineering. [ER, Tab 11, Exhibit 30, Herber Depo. 118:16-25] During the course of Kang's employment, according to Herber customer audits, also called inspections, were performed about once annually. [ER, Tab 11, Exhibit 30, Herber Depo. 126:6-23] Herber identified Merle Oglesby, outside independent Level III Technician Mike Gee, Lira and himself, as the persons who handled internal, customer audits. [ER, Tab 11, Exhibit 30, Herber Depo. 116:22 through 117:3]

In contrast to Mr. Herber's testimony, Petitioner actually did serve as a day-shift lead worker from 1975 until 1995. When he engaged in the protected activity of speaking truthfully to federal authorities about the testing procedures of Respondent, Kang's title as lead worker was removed. Despite the change in his title, Kang continued to perform the functions of lead worker, including training new hires, supervising co-workers and performing audits. These functions were performed often following the requests of Lira. [ER, Tab 8, Declaration of Kang, Par. 4.]

Kang also performed audits during the course of his work at Respondent. There were no negative reactions to the audits conducted by Petitioner

resulting from Kang's English proficiency level. Herber was never made aware, during any audit, that Kang's English proficiency was even considered an issue by a customer, Respondent supervisor or co-worker. [ER, Tab 11, Exhibit 30, Herber Depo. 129:1-7]

Lira was hired by Respondent on December 11, 1995, approximately twenty years after Petitioner was hired. [ER, Tab 10, Exhibit 28, Lira Depo. 4:11] Lira was initially hired for non-destructive testing as a trainee. [ER, Tab 10, Exhibit 28, Lira Depo. 11:7] Around 1997, Lira was promoted to Level II inspector. [ER, Tab 10, Exhibit 28, Lira Depo. 14:13; ER, Tab 10, Exhibit 28, Lira Depo.19:12] Lira worked directly with Kang. Lira was in NDT training; he de-magged parts, cleaned parts and packed parts for Kang. [ER, Tab 10, Exhibit 28, Lira Depo. 13:11-15]

Despite Herber's representations, Lira never performed an audit during Petitioner's term of employment. Lira even asked Kang to perform each of the audits which were conducted, during the time that Lira served as the lead worker in the NDT department and Petitioner served on the day shift. Lira did not have any experience in dealing with customers, during Petitioner's tenure of employment. [ER, Tab 8, Declaration of Kang, Par. 7.]

Lira specifically asked Kang to perform the 2002 Bendix Signal survey, a customer audit, because Mr. Lira wasn't familiar with the particular procedure. Whenever Lira was unfamiliar with an audit procedure, he directed Kang to perform it. [ER, Tab 10, Exhibit 27, Kang Depo., Vol. II, 189:1-4] Kang believed that he had no choice but to perform the procedure, because Lira held the title as his lead worker. [ER, Tab 10, Exhibit 27, Kang Depo., Vol. II, 189:7-8]

*B. In 2003, Respondent Lost a Relatively Small Percentage of its Mag. Inspection Capabilities and Experienced No Comprehensive Loss of Work in the NDT Department. Petitioner's June 9, 2003 Termination Was Not the Result of a Reduction in Force.*

Respondent's Employee Guide does not contain an objective procedure to determine the identities of employees who would be laid off. [ER, Tab 11, Exhibit 30, Herber Depo. 55:13-16]. Herber claims that during the relevant time period, there was no uniform, calculated process that was used to determine the identities of potential employees to be laid off in June of 2003. [ER, Tab 11, Exhibit 30, Herber Depo. 55:11-12] As demonstrated in the immediately proceeding paragraph, night shift supervisor Il Kil (hereinafter "Kil") provides a sharply contrasting view of Respondent ' lay-off practice.

With the exception of Kang, Kil was made aware of terminations, prior to the effective termination date, because in the normal course of business Kil was responsible for selecting the persons to be laid off. At a minimum, Kil was consulted with respect to night shift employee terminations. Kang was the sole exception. [ER, Tab 10, Exhibit 29, Kil Depo. 49:13-23] In the event of terminations due to lack of work (lay-offs), the normal Respondent procedure involved Mr. Kil being asked to prepare a list of employees to be terminated from the night shift. This list was given to Ray Stocke, who would give the list to Human Resources. Normally the HR department would call the employees to be laid off and explain the terms of the termination, as well as the rationale for the decision. Kil never provided such a

list to Mr. Stocke regarding the June, 2003 layoff of Kang. [ER, Tab 10, Exhibit 29, Kil Depo. 70:2-25] Kil was never informed by anyone, prior to Kang's June, 2003 termination, about the possibility of layoffs in the night shift. [ER, Tab 10, Exhibit 29, Kil Depo. 44:25] Kil did not know about Kang's layoff until Mr. Kil arrived at work, after the fact of Kang's termination. [ER, Tab 10, Exhibit 29, Kil Depo. 49:18]

With the exception of Kang, the name of every night shift employee under Kil's supervision who has been laid off was first placed on an Employee Action Request Form. With the exception of Kang, Kil completed and/or approved an Employee Action Request Form for each laid-off, night shift employee. Kil never even received an Employee Action Request Form with respect to Kang's layoff. Mr. Kil knows of no other night shift employee who was laid off under his supervision, for whom Mr. Kil did not complete an Employee Action Request Form [ER, Tab 10, Exhibit 29, Kil Depo. 46:1 through 47:11]

With the exception of Kang's termination, Herber's practice was to receive input from the supervisors of the employees to be laid off. This practice was followed because Herber testified that he wanted to find out from the direct supervisor the person who has the most relevant experience and seniority. [ER, Tab 11, Exhibit 30, Herber Depo. 59:6-13] Herber was responsible for the June, 2003 lay off, involving 3 employees. Herber recommended these employees to be laid off to Robert Briles, Respondent President. [ER, Tab 11, Exhibit 30, Herber Depo. 59:15-23]

The first documented mention of a lay-off was the June 4, 2003 Herber memorandum to Robert Briles, merely 5 days before Kang's termination. ["ER, Tab 10,

Exhibit 13, Herber Memorandum to Rob Briles 6/4/03."] Herber never informed Kil, either before or after the fact, of any rationale supporting Kang's termination. [ER, Tab 10, Exhibit 29, Kil Depo. 44:7-14] Herber never came to Kil and indicated that there would be layoffs in the night shift, due to lack of work or any other reason. [ER, Tab 10, Exhibit 29, Kil Depo. 44:21] Herber never asked for Kil's opinion, concerning the identities of which night shift employees should be laid off. [ER, Tab 10, Exhibit 29, Kil Depo. 44:17]

### *C. Appellant Kang Presented Direct Evidence of Decision-maker Herber's Discriminatory Intent*

PB Fasteners claims that Kang did not provide direct evidence of discriminatory intent, in response to the motion for summary judgment. [Appellee's Brief, p.18.] PBF also suggests that Kang has relied exclusively on the indirect method of proving discrimination, through the *McDonnell-Douglas* framework, waiving the opportunity to argue through this appeal that there was direct evidence of discriminatory intent. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. [Appellee's Brief, p.18.] PBF specifically asserts that neither PBF President Robert Briles, nor Director of Quality and Engineering Robert Herber ("Herber"), the key decision-makers in this case, ever made racial remarks to or about Kang, precluding the proof of discrimination via direct evidence. [Appellee's Brief, p.19.]

According to PBF, "Appellant blatantly misrepresents the record when he repeatedly argues that Herber made racist comments to or about Kang. Although Appellant initially testified that Herber had

called him a 'Stupid Korean,' Appellant recanted that testimony, admitting that '[h]e didn't say 'stupid Korean.'" [Appellee's Brief, p.20.] The District Court accepted this characterization of the facts: "Moreover, Appellant cannot meet his burden to show pretext by relying on his co-workers' alleged racial slurs and acts of discrimination. Appellant has failed to tie any of those seemingly isolated instances to anyone at PBF with authority over the hiring and firing of employees. Indeed, none of the people who allegedly made the derogatory remarks about Appellant's ethnicity had any say whatsoever regarding the decision to end Appellant's employment with PBF, nor was there any link between the timing of the alleged remarks and the decision to terminate Appellant's employment. Additionally, Appellant's attempt to attribute a racial slur to a decision-maker at PBF is equally unavailing, considering that the decision-maker Appellant identified never made the statement that Appellant attempts to attribute to him." [Excerpts of the Record ("ER"), Tab 18, Order p. 7, line 21 through p. 8, line 11.]

In support of Respondent's factual interpretation, necessarily involving a weighing of credibility and a rejection of Kang's perspective on the relevant evidence, the District Court relied upon the following exchange: "This happened in 2003, you said, correct?" [Appellant Depo. 91:18-25.] The interpreter then asked, "You mean when Herber told him stupid Korean?" In response to this question, counsel for PBF answered, "Yeah." Continuing on page 92, lines 1-5, Kang recounted, "He didn't say 'stupid Korean,' but he said, 'You don't speak English after so many years in the United States, and you don't even know how to do your own work.' And he really embarrassed me many

times, and he really made me feel really bad." [ER, Tab 18, Order, p. 8, footnote.]

This deliberate placement of facts out of context, to the detriment of Kang, should and can be readily rectified. On page 50 of Kang's deposition, counsel for PBF asked Kang to identify the person who had called Kang a "Stupid Korean." In response, Kang named Herber as one of the many individuals who had referred to Kang using the term, "Stupid Korean." Kang did not hesitate in response to this question, immediately implicating the persons who had exposed him to this treatment, answering, "Bob Herber and Andy. Do I have to tell you the instance in 2000, 2001 and 2002?" [Kang Depo. 50:3-22.]

Several minutes later in the deposition, in an entirely different context, questioning by counsel for Respondent implicated Herber's derogatory reference to Kang's level of English proficiency. Alluding to the various points in time when Herber criticized or mentioned Kang's level of English proficiency, counsel for PBF asked Kang about, "any specific incidents of this happening?" [Kang Depo. 91:7-8.] To this specific question Kang replied, "he said that in January 2003, 'You don't speak English, and you've been here for 30 years. You don't know how to work.'" [Kang Depo. 91:7-8.]

Counsel for PBF then asked, "This happened in 2003, you said, correct?" [Kang Depo. 91:18-25.] The Korean language interpreter asked, "You mean when Herber told him stupid Korean?" To this question, Counsel for Respondent responded, "Yeah." [Kang Depo. 91:18-25.] It was at this point, in specific response to the Korean language interpreter's question of whether Herber had used the phrase "stupid Korean" in 2003, that Kang stated "He didn't say 'stupid

Korean,' but he said, 'You don't speak English after so many years in the United States, and you don't even know how to do your own work.' And he really embarrassed me many times, and he really made me feel really bad." [Kang Depo. 92:1-5.]

In this manner, Respondents have intentionally overlapped and conflated two of Kang's distinct, independent responses. Kang specifically and unequivocally stated that Herber called him "Stupid Korean," in 2000, 2001, and 2002 [Kang Depo. 50:3-22]. This is direct evidence of discrimination. "Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F. 3d 1217, 1221. Much later in the deposition, counsel for PBF asked about an incident in 2003, during which Herber insulted Kang's level of English proficiency. It is evident that Kang was speaking only about Herber's 2003 English proficiency level comment, when he stated that Herber did not call him "stupid Korean" on that particular occasion.

*D. Herber Subjected Petitioner to a series of Adverse Employment Consequences Including Termination. Each Adverse Consequence Was Violative of Respondent's Own Policies, Practices and/or Procedures.*

1. THE UNUSUAL CIRCUMSTANCES SURROUNDING PETITIONER'S TRANSFER TO THE NIGHT SHIFT CONSTITUTE AN ADVERSE EMPLOYMENT CONSEQUENCE.

It was solely Herber's decision to transfer Kang from the day to the night shift. [ER, Tab 11, Exhibit 30, Herber Depo. 70:16-18] Kil was not a part of the process regarding Kang's transfer to the night shift. [ER, Tab 11, Exhibit 30, Herber Depo. 70:24 through 71:7]

Despite a lack of personal familiarity with Kang's performance levels, Herber slashed Kang's standard performance review scores, from 90 to 70. [ER, Tab 11, Exhibit 30, Herber Depo. 80:4-17] Kang's Direct Supervisor, Jim Edwards, had contemporaneously approved the form. [ER, Tab 11, Exhibit 30, Herber Depo. 81:16-18] Herber had never seen any other employee's performance review scores crossed out, as he had done to Kang. [ER, Tab 11, Exhibit 30, Herber Depo. 83:15-20]

Herber never gave a specific reason for Kang's transfer from the day to the night shift. [ER, Tab 10, Exhibit 28, Lira Depo. 69:21-22] In spite of his testimony about signing Kang's Employee Action Request Form, Lira testified that he has never executed a form to transfer an employee. [ER, Tab 10, Exhibit 28, Lira Depo. 72:4-7] Lira had no specific

recollection of ever having seen the 1/10/03 Employee Action Request Form. [ER, Tab 10, Exhibit 28, Lira Depo. 72:23; ER, Tab 10, Exhibit 28, Lira Depo. 73:4] Herber testified that he wanted Kil around to help Kang with interpretation issues during night shift. Herber also testified that he cannot think of any specific, work-related "interpretation issues" which manifested during Kang's more than 27 years. [ER, Tab 11, Exhibit 30, Herber Depo. 71:8-19]

Employee Action Request Forms are used for employee transfers, employee pay increases and any other changes in an employee's status. Kang's transfer from the day to the night shift is reflected in an Employee Action Request Form. [ER, Tab 11, Exhibit 30, Herber Depo. 73:12-15, 84:15-19]

Significantly, no other person was performing the NDT function on the night shift during, at the very least, the six-month period before Kang was transferred to the night shift. [ER, Tab 11, Exhibit 30, Herber Depo. 92:1-2] The night shift had been closed for months when Kang was transferred from the day shift. [ER, Tab 11, Exhibit 30, Herber Depo. 93:20-21]

Petitioner was familiar with Respondent ' practice of transferring individuals to the night shift, immediately before terminating their employment. [ER, Tab 8, Declaration of Kang, Par. 10.] This was a demotion, because the transfer disrupted nearly thirty years of working the day shift. His entire personal and familial schedule was disrupted by this change. [ER, Tab 8, Declaration of Kang, Par. 10.]

In 2002, Herber told Kang he was being transferred from the day to the night shift because of Kang's performance with respect to the 2002 Bendix Signal survey. Normally, the lead worker or Level III supervisor demonstrated this method to customer

inspectors. Lead Worker Lira was unfamiliar with the procedure and had Kang demonstrate it. [ER, Tab 10, Exhibit 26, Kang Depo., Vol. I, 131:10-25]

The customer indicated that Kang was performing the procedure incorrectly. Kang was following precisely the procedure that he was taught by an ostensibly independent, Level III Technician, who had come to train everyone. [ER, Tab 10, Exhibit 26, Kang Depo., Vol. I, 132:3-7] The Level III trainer was a personal friend of Herber. [ER, Tab 10, Exhibit 27, Kang Depo., Vol. II, 186:8-9] Kang had been trained to place the part in a perpendicular fashion. The customer told Kang that this was incorrect. [ER, Tab 10, Exhibit 27, Kang Depo., Vol. II, 186:21-22]

It would have been Respondent's normal practice to discuss the January, 2003 Employee Action Request Form, regarding Kang's potential transfer to the night shift with Kil, night shift manager. It is Respondent's normal practice to discuss with the potential supervisor the potential new employee. [ER, Tab 11, Exhibit 30, Herber Depo. 87:13-22] Contrary to Respondent's normal practice, Herber never asked for Kil's opinion regarding the prospect of Kang's transfer from the day shift to the night shift. [ER, Tab 10, Exhibit 29, Kil Depo. 28:6] Herber neither discussed nor offered a reason to Kil for Kang's transfer from the day to the night shift. [ER, Tab 10, Exhibit 29, Kil Depo. 27:22 through 28:3]

The night shift was without a certified Level II inspector for over six months, until Kang was transferred. [ER, Tab 10, Exhibit 29, Kil Depo. 26:8-16] Herber spoke with Kil the Friday before the Monday that Kang was transferred to the night shift. Mr. Herber told him that Kang would be transferred to the

night shift the following week. [ER, Tab 10, Exhibit 29, Kil Depo. 27:16 through 28:27]

As part of his managerial responsibilities, Kil approved via signature all Employee Action Request Forms for employees under his supervision. [ER, Tab 10, Exhibit 29, Kil Depo. 41:59] Also contrary to Respondent's normal business practice, Kil never saw the Employee Action Request Form that documented Kang's transfer to the night shift, ostensibly approved by Lira. [ER, Tab 10, Exhibit 29, Kil Depo. 41:5-20]

### 2. HERBER'S SELECTION OF PETITIONER FOR TERMINATION WAS THE PRODUCT OF DISCRIMINATORY ANIMUS.

Herber stated that he learned of Kang's alleged English proficiency level when Kang "failed the certification test after being there 25 years." [ER, Tab 11, Exhibit 30, Herber Depo. 121:21 through 122:17]. Kang, however, has never failed a certification test. [ER, Tab 8, Declaration of Kang, Par. 6]

Herber's sole basis for concluding that English is a component of Kang's job responsibility is the fact that one had to communicate with customers during the "many audits." [ER, Tab 11, Exhibit 30, Herber Depo. 102:3-8] Prior to Herber's observation, no one at Respondent , including Kang's immediate supervisors, ever informed Herber that Kang's English proficiency was a performance issue. [ER, Tab 11, Exhibit 30, Herber Depo. 66:24 through 67:7] The "criterion" is absent from Petitioner's performance evaluations [ER, Tab 10, Exhibits 16-21.]

Herber was never trained that Kang's level II responsibilities included English proficiency. [ER, Tab 11, Exhibit 30, Herber Depo. 120:17-21.] Herber stated

that he believes part of Kang's responsibility was to communicate during the audits with customers. This belief is not based on the Respondent Employee Guide, or criteria identified in the Employee Performance Reviews. Instead, this belief was based on his own personal perspective, one that he does not attribute to any other person. [ER, Tab 11, Exhibit 30, Herber Depo. 119:12 through 120:20]

Herber admitted that Appellant's level of English proficiency should have been documented by his supervisors, in the event that his proficiency level impeded his work performance. [ER, Tab 11, Exhibit 30, Herber Depo. 66:8-14]

Herber never communicated to Robert Briles that Kang's English proficiency was a required component of Kang's Level II Technician position. [ER, Tab 11, Exhibit 30, Herber Depo. 124:2-7] Herber personally felt that Kang had a responsibility to speak English proficiently, but Herber is not aware of any personnel file record, reflecting an interference with Kang's work duties, caused by Petitioner's level of English proficiency. There was never an indication that Petitioner didn't understand what he was doing in the workplace. [ER, Tab 11, Exhibit 30, Herber Depo. 124:8-16]

Respondent states that it terminated Kang and retained Lira because "Mr. Lira was more proficient than Petitioner and spoke and understood English better than Petitioner." [ER, Tab 10, Exhibit 25, "Respondent ' Responses to Petitioner's Second Set of Special Interrogatories."] Herber testified that English proficiency was one of the factors weighed in determining to lay off Kang. [ER, Tab 11, Exhibit 30, Herber Depo. 63:6-8]

There is no written documentation of Kang's language skills interfering with his performance, despite dozens of performance evaluations. When recommending persons for termination, Herber considers seniority for Ulises Ortega and Andy Romero, but abandons that criterion with respect to the comparison of Lira and Petitioner. With nearly thirty years' experience at Respondent, Kang had the most experience of all NDT workers in June of 2003, including 20 years as a lead worker. [ER, Tab 10, Exhibit 12, "Non Destructive Testing Department #32 Memorandum 6/6/03."]

Contrary to Respondent's Employee Guide, Herber never discussed Kang's lack of English Language proficiency in Kang's performance evaluation. The performance evaluations have no section dedicated to language proficiency, or verbal communications skills whatsoever. [ER, Tab 11, Exhibit 30, Herber Depo. 65:19-23]

Dealing with customers is not an essential component of the job, neither as a Level II technician nor as a lead worker. With respect to Petitioner's tenure of employment at Respondent, customer interaction was not a component of any job description, Employee Performance Evaluation or application for Level II Technicians or Lead Workers. Audits were normally handled by Level III inspectors and occurred on an annual or semi-annual basis. [ER, Tab 8, Declaration of Kang, Par. 5]

Herber attempted to create a "for cause" rationale for Petitioner's termination. Respondent admits that there is no record of a write-up that pre-dates the 4/25/03 "failure to inspect" Disapproval Report write-up of Kang. [ER, Tab 10, Exhibit 25,

"Respondent' Responses to Petitioner's Second Set of Special Interrogatories."]

A Disapproval Report is issued when a mistake is made, such as the failure to follow a directive, or the failure to abide by a company rule. [ER, Tab 10, Exhibit 29, Kil Depo. 56:6-9] Kil never prepared a Respondent Disapproval Report for Kang. [ER, Tab 10, Exhibit 29, Kil Depo. 56:1-12] In fact, Kil is not aware of a single incident wherein Kang failed to follow a company rule. [ER, Tab 10, Exhibit 29, Kil Depo. 56:1-18]

No one, including Herber, has ever told Kil that Kang failed to follow a company rule. [ER, Tab 10, Exhibit 29, Kil Depo. 56:20-26] Kil never told Herber, or any other Respondent supervisory personnel, that Kang had breached a company rule. [ER, Tab 10, Exhibit 29, Kil Depo. 59:1-13] If Kil had known that Kang was liable of a company rule infraction, Mr. Kil would have had an obligation to prepare a Disapproval Report for Kang. [ER, Tab 10, Exhibit 29, Kil Depo. 57:1-13] The issuance of Disapproval Reports is not discretionary. It is the supervisor's affirmative duty to document company rule infractions in the form of Disapproval Reports. [ER, Tab 10, Exhibit 29, Kil Depo. 57:13-15]

During Kang's employment tenure, Kil never saw Kang's Respondent Disapproval Report dated 4/25/03. [ER, Tab 10, Exhibit 29, Kil Depo. 58:1-17] The line for Kang's supervisor's signature, on the bottom of the 4/25/03 Disapproval Report, is blank. This line should have been executed by Kil, Kang's supervisor. [ER, Tab 10, Exhibit 29, Kil Depo. 58:8-25] Kil has no idea why he was not asked to review, sign or otherwise approve the 4/25/03 Disapproval Report. [ER, Tab 10, Exhibit 29, Kil Depo. 59:2] Herber never even told Kil about the 4/25/03 Disapproval Report after the fact.

[ER, Tab 10, Exhibit 29, Kil Depo. 59:1-16] Not even Mr. Kil's assistant, authorized to sign Disapproval Reports in Mr. Kil's absence, signed the 4/25/03 form. [ER, Tab 10, Exhibit 29, Kil Depo. 59:20-25]

Herber did not work nights. [ER, Tab 10, Exhibit 29, Kil Depo. 59:8] Kil's assistant never told Mr. Kil that Kang had failed to follow a rule; Kil has no idea how Herber completed the 4/25/03 Disapproval Report, since he never had any form of discussion with Mr. Herber about this report. [ER, Tab 10, Exhibit 29, Kil Depo. 60:2-7] Kil deemed the 4/25/03 Disapproval Report to have been completed in an unusual fashion, not within the normal practice of the company. [ER, Tab 10, Exhibit 29, Kil Depo. 62:19-25]

Kil has never been made aware of the alleged "first occasion" of Kang's company rules infraction, as alleged in the 4/25/03 Disapproval Report. [ER, Tab 10, Exhibit 29, Kil Depo. 63:5] Even had there been a first occasion, the documentation of such would have had to have been in the office. [ER, Tab 10, Exhibit 29, Kil Depo. 63:8] Disapproval Reports are distributed solely for serious rule violations. Some first occurrences can result in a verbal warning. Neither Kil nor his assistant ever gave a verbal warning to Kang. No one else had ever told Mr. Kil that Kang had a first occurrence. [ER, Tab 10, Ex. 29, Kil Depo. 64:2-25]

Kang was terminated on June 9, 2003. [ER, Tab 10, Exhibit 27, Kang Depo., Vol. II, 192:9] Kang found out about his termination only when he punched his timecard at 4:20 for the 4:30 shift and it didn't work. A woman from the office tried to assist Kang but it still didn't work. [ER, Tab 10, Exhibit 27, Kang Depo., Vol. II, 192:16-25]

Kang looked frantically for Kil. Unable to find Mr. Kill, Petitioner went to see Lira, who told Kang

that somebody at personnel wanted to see Kang. Kang had had one helper, a trainee who was laid off the day before. Personnel had called this helper in advance, informing him about the lay-off before any attempt to punch his tie card was made. Kang wasn't afforded such courtesy. [ER, Tab 10, Exhibit 27, Kang Depo., Vol. II, 193:1-25]

Kang told Kil that Kang had been terminated. When he informed Kil, Petitioner was unaware of the rationale for the termination. Kil had also not been informed of the decision to terminate Kang's employment, so he went to the human resources department and inquired. [ER, Tab 10, Exhibit 29, Kil Depo. 43:13-25] Tracey Romero, from Respondent' Human Resources department, confirmed Kang's termination, officially informing Kil of the fact. [ER, Tab 10, Exhibit 29, Kil Depo. 44:2]

Kang signed a June 9, 2003 COBRA Notification, the same day that he was notified about his termination. He was not given the legally mandated opportunity to review, consult and check for changes. [ER, Tab 10, Exhibit 6, "6/9/03 COBRA Notification."] In the past, Respondent's President, Robert Briles, had asked Kil to translate Level II certification test materials for Kang. Respondent knew that Kang couldn't speak or read English well enough to interpret legal documents independently. [ER, Tab 10, Exhibit 29, Kil Depo. 66:8-11] When he was terminated, Lily Wing never asked Kil to read for Kang any of the documents affiliated with the termination of Petitioner's employment. [ER, Tab 10, Exhibit 29, Kil Depo. 68:7-9]

Kang's June 3, 2003 Employee Action Request Form was not signed by Herber even though he was the director; normally during the course of business the

director signs as approving party and he was Kang's supervisor. [ER, Tab 11, Exhibit 30, Herber Depo. 110:24 through 111:21] Respondent's President, Robert Briles, solely upon Herber's recommendation, decided to lay off Kang. [ER, Tab 11, Exhibit 30, Herber Depo. 113:13-18]

Night Manager Kil did not sign the Employee Action Request Form dated June 10, 2003, commemorating Kang's termination. No reason for this lay-off is indicated on the form, signed on June 6, 2003 only by Robert Briles with a June 9, 2003 effective date. Significantly, this form was not signed by Kil, Kang's night shift supervisor. [ER, Tab 10, Exhibit 5, "Employee Action Request Form dated 6/10/03."]

## REASONS FOR GRANTING THE PETITION

The court of appeals decision has decided an important question of federal law in a manner that directly contradicts this Court's *Ash v. Tyson Foods, Inc.* decision. *Ash v. Tyson Foods, Inc.* (2006) 546 U.S. 454, 126 S. Ct. 1195. The term "stupid Korean" is direct evidence of racial discrimination as a matter of law, tantamount to the use of the term "boy" in the *Ash* case.

Certiorari should be granted to bring the Ninth Circuit into compliance with this Court's decision in *Ash*, *Anderson v. City of Bessemer* (1985) 470 U.S. 564 and *Reeves v. Sanderson* (2000) 530 U.S. 133. The court of appeals has inappropriately adopted the facts of the moving party, to the detriment of the non-moving party.

## CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

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(any footnotes trail end of each document)

No. 06-55913
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEUNG KANG, an individual, Plaintiff - Appellant,
v.
PB FASTENERS, a Corporation doing business in California, Defendant - Appellee,
and
MERLE OGLESBY, an individual, Defendant.

February 7, 2008, Argued and Submitted, Pasadena, California

February 27, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For NEUNG RANG, an individual, Plaintiff - Appellant: Franklin L. Ferguson, Jr., Los Angeles, CA.

For PB FASTENERS, a Corporation doing business in California, Defendant - Appellee: Eric L. Dobberteen, Esq., CLARK & TREVITHICK, Los Angeles, CA.

MERLE OGLESBY, an individual, Defendant: No appearance.

JUDGES: Before: PREGERSON, ARCHER ** , and WARDLAW, Circuit Judges.

OPINION

MEMORANDUM *

Before: PREGERSON, ARCHER**, and WARDLAW, Circuit Judges.

In this wrongful termination action, Neung Kang appeals the district court's decisions to (1) grant summary judgment for his former employer, PB Fasteners ("PBF"), and (2) strike his motion to amend his complaint. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

Even assuming that Kang established a prima facie case of employment discrimination under 42 U.S.C. § 1981, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), the district court correctly concluded that Kang failed to raise a triable issue of fact as to whether PBF's proffered legitimate non-discriminatory reasons were pretextual. PBF asserts that it reopened the night shift in January 2003 to increase efficiency and selected Kang to fill the slot because he had the experience necessary to run a shift by himself, his language difficulties made it harder for him to interact with customers during the day, and the night shift manager, Il Kil, was a Korean speaker. PBF terminated Kang in June 2003 when it laid off three of the five members of Kang's NDT department. The department, lost most of its work when PBF lost its

necessary government qualifications, and the department's lead worker, Mario Lira, was retained instead of Kang because Lira "was more proficient at the job" and spoke better English.

Kang offers no direct evidence, and only weak circumstantial evidence, that PBF's proffered reasons are pretextual. *See Godwin v. Hunt Wesson*, 150 F.3d 1217, 1220, 1222 (9th Cir. 1998) (noting that although "very little" evidence of direct discrimination is needed to survive summary judgment, circumstantial evidence must be "specific" and "substantial"). In particular, there is no evidence suggesting that Robert Herber, the supervisor directly responsible for Kang's transfer and termination, bore any racial animus toward him. Kang's own testimony demonstrates that Herber did not call Kang a "stupid Korean." n1 Nor is there evidence that Herber was aware of any discriminatory treatment toward Kang by his co-workers, except one incident that occurred before Herber became Kang's supervisor. Herber's consideration of Kang's language skills as a factor in both decisions was not improper: Kang admits that he speaks English poorly and that his job required him to interact with customers, and Herber testified to having witnessed Kang's language difficulties affect his job performance. n2 Finally, any procedural irregularities in Kang's transfer and termination were, as the district court noted, "minor at best," and do little, if anything, to suggest that Herber acted with discriminatory intent.

Because Kang failed to raise a triable issue as to pretext, the district court properly granted summary judgment for PBF as to his § 1981 claims. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994).

II

The district court also correctly granted summary judgment for PBF as to Kang's state law contract claims. Considering the totality of the circumstances, Kang was an at-will employee and no implied-in-fact employment contract was created. *See Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 335-37, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 (2000) (noting that California employees are presumed to be employed at will, but that parties can contract, explicitly or implicitly, to place greater limitations on an employer's termination rights).

PBF's 2001 Employee Guide hurts, rather than helps, Kang's claim that an implied-in-fact contract was created. The first page of the guide specifies that PBF "is an at will employer" and that "an employee may be terminated without cause" at the company's discretion. The guide provides examples of misconduct for which "[e]mployees may be disciplined, up to and including termination," but it specifically provides that the list is not exhaustive and nothing suggests that an employee could not be terminated for reasons other than misconduct. Finally, the document makes clear that "[n]othing in this Guide is intended to alter the at-will status of employment with the company." Accordingly, a reasonable fact finder could not rationally determine that the guide formed the basis for an implied-in-fact agreement; indeed, it supports the proposition that Kang was an at-will employee. *Cf. id.* at 346 (finding an implied contract where an employer's documents contained ambiguous and contradictory statements such that "a fact finder could rationally determine that despite its general disclaimer, [the employer] had bound itself to the specific provisions of these

documents").

Kang's thirty years of employment with PBF, over which time he allegedly "received merit raises, promotions, and highly favorable performance reviews," does not, standing alone, create an implied-in fact contract. *Id.* at 342 ("Absent other evidence of the employer's intent, longevity, raises and promotions . . . do not, *in and of themselves*, . . . constitute a contractual guarantee of future employment security." (emphasis in original)); *but see Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 677, 680, 254 Cal. Rptr. 211, 765 P.2d 373 (1988) (noting that an "employee's longevity of service" can be a factor as to the existence of an implied-in-fact contract). As the California Supreme Court has noted, "[a] rule granting such contract rights on the basis of successful longevity alone would discourage the retention and promotion of employees." *Guz*, 24 Cal.4th at 342.

Because Kang presents no evidence of an implied contract other that the employee guide and his long tenure of service, the district court properly granted summary judgment as to Kang's contract claim. n3

III

Nor did the district court abuse its discretion in striking Kang's motion to amend his complaint for failure to comply with a local rule. Kang's attorney informed opposing counsel of his intention to amend the complaint only ten days before filing the motion, thereby violating Local Rule 7-3, which requires counsel to meet and confer with opposing counsel at least twenty days prior to filing any motion that, under

the Federal Rules of Civil Procedure, need not be filed within a specified period of time. *See* Fed. R. Civ. P. 15(a) (governing motions to amend complaints and not setting forth any specific period of time within which they must be filed). Moreover, even if the local rule did not apply, the district court would not have abused its discretion by striking the motion because it was untimely and filed with undue delay.

IV

The district court's grant of summary judgment for PBF and decision to strike Kang's motion to amend his complaint are therefore

AFFIRMED.

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

**The Honorable Glenn L. Archer, Jr., Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

1Kang testified that Herber actually said, "You don't speak English, and you've been here for 30 years. You don't know how to work." These statements, however hurtful, are not probative of racial animus.

2It is also noteworthy that one of the three employees laid off was Herber's own son-in-law, further suggesting that the selection was based purely on the employees' qualifications rather than on improper motives.

3Because Kang has failed to raise a triable issue as to the existence of an implied-in-fact contract, his related claim based on the implied covenant of good faith and fair dealing also fails. *See Guz*, 24 Cal. 4th at 349-50 (noting that the implied covenant of good faith and fair dealing "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement").

Filed 5/22/06
CASE NO.: CV D5-4196 ABC (VBKx)
UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

NEUNG KANG,
Plaintiff,

v.

PB FASTENERS,
Defendant.

ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pending before the Court is a Motion for Summary Judgment filed by PB Fasteners. The Court previously determined that it did not require oral argument in this matter. Upon consideration of the parties' submissions and the case file, the Court hereby GRANTS PB Fastener's Motion.

FACTUAL BACKGROUND

Plaintiff Neung Kang, a Korean-American man, alleges that Defendant PB Fasteners ("PBF") discriminated against him when it laid him off from his position with PB Fasteners, a position that he had held for over thirty years. According to Plaintiff, PBF discharged him because of his ancestry or ethnic background. Plaintiff began working for PBF in its non-defective testing department in 1973 and continued to work for PBF until he was laid-off in 2003.

PBF manufactures precision, high-strength aerospace fastener that are used in commercial. and military aircrafts around the word. PBF's non-defective testing department, the department in which Plaintiff worked, was responsible for inspecting and testing PBF fasteners to ensure that they met customer specifications. This responsibility extended to "magnetic particle" inspection of the fasteners.

As of 2003, the non-defective testing department was comprised of five employees: one lead person; two level II inspectors; and two trainees. The lead person's duties included first level supervision of the department, conducting inspections, and certifying the fasteners. This position was held by Mario Lira. The level II inspectors were certified inspectors, but they were nevertheless subordinates of the lead person. Their responsibilities included inspecting and certifying the fasteners. These positions were held by Plaintiff and Andy Romero. The two trainees were not certified, and, as such, they were permitted only to help process parts, but not to inspect the parts. The trainee positions were held by Ulises Ortega and Ivan Torres.

In 2003, the federal government and other customers revoked PBF's qualifications to conduct the magnetic particle inspection procedure. Since then, PBF has been required to send parts needing a magnetic particle inspection to outside vendors. Citing this fact, PBF reduced its workforce in the non-defective testing department. In June 2003, it laid off three of its five employees assigned to that department. Specifically, it laid off the two level II inspectors, including Plaintiff, and one of the two trainees. After the lay-offs, only the lead person, Mario Lira, and one trainee remained in

the l non--defective testing department. PBF has never hired additional people to fill the jobs that it eliminated in 2003.

On June 9, 2005, Plaintiff filed a Complaint in this action. He initially raised four claims far relief, but only three of those claims remain: (1) wrongful termination under 42 U.S.C. § 1981; (2) breach of implied-in-fact contract; and (3) breach of the covenant of good faith and fair dealing under California law.

On April 10, 2006, PBF filed a Motion for Summary Judgment. Thereafter, on April 27, 2006, Plaintiff filed an Opposition to Plaintiff's Motion. On May 4, 2006, PBF filed a Reply.

## STANDARD ON A MOTION FOR SUMMARY JUDGMENT

The party moving for summary judgment has the initial burden of establishing that there is "no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c); see British Airways Bd. v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978); Fremont Indemnity Co. v. California. Nat'l Physician's Insurance Co., 954 F. Supp. 1399, 1402 (C. D. Cal. 1997).

If, as here, the non-moving party has the burden of proof at trial, the moving party has no burden to negate the opponent's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party does not have the burden to produce a evidence showing the absence of a genuine issue of material fact. Id. at 325. "Instead, . . . the burden on the moving party may be discharged by

`showing' - that is, painting out to the district court - that there is an absence of evidence to support the nonmoving party's case." Id. (citations omitted).

Once the moving party satisfies this initial burden, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings. . .[T]he adverse party's response. . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Pro. 56(e) (emphasis added). A "genuine issue" of material fact exists only when the nonmoving party makes a sufficient showing to establish the essential elements to that party's case, and on which that party would bear the burden of proof at trial. Celotex, 477 U.S. at 322-23. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which a reasonable jury could reasonably find for plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in favor of the nonmovint. Id. at 245. However, the court must view the evidence presented "through the prism of the substantive evidentiary burden." Id. at 252.

## DISCUSSION

I. Plaintiff Cannot Maintain His Section 1981 Claim for Wrongful Termination.

Under 42 U.S.C. § 1981, discrimination based on "ancestry or ethnic characteristics" is prohibited. St. Francis Coll. v. Al-Khazraji,n 481 U.S. 604, 613 (1987). "Although national origin discrimination is not within the ambit of § 1981, race has been defined broadly to

cover immigrant ethnic groups." Fonseca v. Sysco Food Servs. of Arizona Inc., 374 F.3d 840, 850 (9th Cir. 2004) (citing Manatt v. Bank of Am., NA, 339 F. 3d 792, 798 (9th Cir. 2003). Analysis of an employment discrimination claim under § 1981 follows the same legal. principles as those applicable in a Title VII disparate treatment case. Fonseca, 374 F. 3d at 850. Both require proof of discriminatory treatment and the same set of facts can give rise to both claims. Id. (citing Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985)).

Under the Supreme Court's decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (2000), a plaintiff alleging disparate treatment under Title VII must first establish a prima facie case of discrimination. McDonnell Douglas Corp., 411 U.S. at 802. To do so, the plaintiff must establish four things: (1) that he belongs to a protected class; (2) that he was qualified for the position; (3) that he was subject to an adverse employment action; and (4) that he was treated less favorably than similarly situated individuals outside of his protected class. Id. Under the McDonnell Douglas framework, "[t]he requisite degree of proof necessary to establish a prima facie case for Title VII . . . on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence." Wallis v. J. R. Co., 26 F. 3d 885, 889 (1994)

If the plaintiff makes this initial showing, the burden of production, but not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action. Id. If the employer does so, the plaintiff must show that the articulated reason is pretextual. Plaintiff can do so in one of two ways: (1) directly, by showing that

unlawful discrimination more likely motivated the employer; or (2) indirectly, by showing that the employer's proffered explanation is "unworthy of credence" because it is internally inconsistent or otherwise not believable. Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1124 (9th Cir. 2000).

In ruling on a summary Judgment motion in employment discrimination cases, courts must be mindful that "the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment." Id. "This is because `the ultimate question is one that can only be resolved through a searching inquiry - one that is most appropriately conducted by a factfinder, upon a full record.'" Id. (citing Schnidrig v. Columbia Mach. Inc., 80 F.3d 1406, 1410 (9th cir. 1996)).

Here, Plaintiff has failed to produce enough evidence to maintain his section 1981 claim. First, he has not met his minimal burden to establish a prima facie case of discrimination. Specifically, he has not shown that similarly situated individuals outside of his protected class were treated more favorably. On the contrary, the only other similarly situated person to Plaintiff was also laid off in 2003. Indeed, once PBF last its qualifications to conduct magnetic particle inspection, it eliminated all existing level II inspector positions, not just Plaintiff's position. Although Plaintiff attempts to compare his status to that of Mario Lira, this comparison is unavailing because Mr. Lira was not a level II inspector. Rather, he was and remains a lead inspector, and, as such, he was Plaintiff's supervisor, not his equal. Plaintiff even recognized this fact in his deposition.

Supplemental Decl. of E. Alex Beroukimn, Exh. A; Id.; Exh. C). Accordingly, no similarly situated individual received more favorable treatment.

Moreover, Plaintiff has not shown that PBF has hired anyone to fill the position that he had at PBF. On the contrary, PBF eliminated the level II inspector position all together in 2003. Since that time it has not sought to reinstate the position or create the position under a different title. Instead, consistent with its explanations, PBF appears to have eliminated the position due to a decrease in workload.

Second, even if Plaintiff had met his initial burden, he has cited no evidence to show that PBF's stated reason for laying him off was a pretext for discrimination. PBF articulated a legitimate, nondiscriminatory reason for the challenged action - namely, that it was forced to reduce its workforce after it lost its qualification to conduct magnetic particle inspection. This reason is neither internally inconsistent nor otherwise unbelievable. Indeed, it makes sense considering that a large portion of the work performed in Plaintiff's department was transferred to outside companies. Although Plaintiff states that he did not notice a decrease in work, this self-serving statement, absent supporting evidence, cannot establish a triable issue of fact.[1] And in any event, Plaintiff himself submitted uncontroverted probative evidence showing that PBF's non-defective testing department suffered a pronounced decrease in "magnetic particle" inspection of fasteners.

Moreover, Plaintiff cannot meet his burden to show pretext by relying on his co-workers' alleged racial

slurs and acts of discrimination. Plaintiff has failed to tie any of those seemingly isolated instances to anyone at PBF with authority over the hiring, and firing of employees. Indeed, none of the people who allegedly made the derogatory remarks about Plaintiffs' ethnicity had any say whatsoever regarding the decision to end Plaintiff's employment with PBF, nor was there any link between the timing of the alleged remarks and the decision to terminate Plaintiff's employment.[2] Additionally, Plaintiff's attempt to attribute a racial slur to a decisionmaker at PBF is equally unavailing, considering that the decisionmaker Plaintiff identified never made the statement that Plaintiff attempts to attribute to him.[3]

Likewise, Plaintiff's reliance on an alleged physical attack he suffered at PBF is not relevant to whether PBF's stated decision to terminate his employment was a pretext for discrimination. Although Plaintiff claims that he was attacked by co-workers, he does not claim, nor does he cite any evidence suggesting, that any decisionmaker at PBF knew of the attack. See Mondero v. Salt River project, 400 F.3d 1207, 1213 (9th Cir. 2005) (stating that comments of employees not acted upon or communicated to a decision maker are insufficient to establish pretext); see also Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1437 (9th Cir. 1990) (same). And in any event, Plaintiff cannot establish any nexus between the alleged attack and PBF's decision to terminate his employment.

Furthermore, Plaintiff's transfer to the nightshift, either in isolation or considered with other evidence cited by Plaintiff, is insufficient to establish a discriminatory pretext. The transfer, while perhaps

undesirable to Plaintiff, was not an adverse change in employment status because Plaintiff retained the same level of seniority that he enjoyed in his previous shift. See Burlington Indus., Inc. v. Ellerth,524 U.S. 742, 761 (1998) (stating that a tangible employment action is a significant change in employment status, "such as hiring, firing, failure to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"); Dennis v. Nevada, 282 F. Supp. 2d 1177, 1183 (D. Nev. 20003) ("A reassignment to a more inconvenient job or position is insufficient to show tangible employment action.") (citing Harlston v. McDonnell Douglas Corp., 37 F. 3d 379, 382 (8th Cir. 1994)). More importantly, although not obligated to do so, PBF cited several unrebutted non-discriminatory reasons for the transfer. For example, it explained that it wanted someone who spoke Korean, like the nighttime manager, to supervise Plaintiff because Plaintiff did not speak English. Additionally, PBF stated that it wanted its non-defective testing machines running day and night to increase efficiency. Moreover, because of Plaintiff's years of experience, PBF believed that he could perform the job by himself. And in any event, aside from self-serving speculation, Plaintiff has utterly failed to show any nexus between the decision to transfer him to the nightshift and the decision to terminate his employment.

Finally, the alleged irregularities in the way in which Plaintiff was transferred to the night shift, selected for termination, and written up for company violations cannot establish pretext. First, the irregularities that Plaintiff cites are minor at best. But more importantly, nothing suggests that these irregularities had anything

to with the decision to terminate his employment. And to the extent that this evidence suggests a discriminatory pretext, it is at best circumstantial, but neither specific enough nor substantial enough to create a genuine issue of material fact.fn4 Moreover, it in no way detracts from PBF's stated reason for discharging Plaintiff, particularly because PBF discharged the other level II inspector and eliminated the position altogether.

In short, Plaintiff cannot meet his initial burden to establish a prima facie case of discrimination because he has not shown that PBF treated him differently than a similarly situated person. And even if he could make a prima facie case, he has cited no evidence to create a triable of fact questioning PBF's stated reason for discharging him. Accordingly, his Section 1981 claim fails.

II. Plaintiff's Employment With PBF Was At-will.

In California, employment for an unspecified term is terminable at the will of either party. Cal. Lab. Code § 2922. Absent proof of an agreement to the contrary, an employer may discharge an employee at any time and for any reason, regardless of the employer's motive, arbitrariness, or "bad faith." Guz v. Bechtel National Inc., 24 Cal. 4th 317, 327 (2000).

Nevertheless, California recognizes that implied-in-fact contracts can arise prohibiting an employer from terminating an employee absent "good cause" to do so. To determine the existence of such a contract, the entire relationship of the parties is examined. See Eisenberg v. Alameda Newspapers, Inc., 74 Cal. App.

4th 1359, 1387 (1999). The factors to consider include: "the terms of any relevant application for employment, employee handbook or manual; the personnel policies and practices of the employer; the employee's longevity of service; actions or communications by the employer constituting assurances of continued employment; and the practices of the industry in which the employee is engaged." Id. If, in a particular case, the facts are undisputed and admit only one conclusion as a matter of law, the existence of an implied promise to discharge for cause may be resolved on summary judgment. Id. at 1386-87; Davis v. Consolidated Freightways, 29 Cal. App. 4th 354, 366 (1994).

Here, Plaintiff contends that the PBF's Employee Guide sufficiently rebuts the presumption of at-will employment.[5] Specifically, he asserts that the Employee Guide provides that all employees must receive advance notice of termination decisions. He also notes that the Employee Guide lists examples of discipline problems that can result in immediate dismissals and describes a progressive disciplinary policy of warnings. Plaintiff contends that these aspects of the Employee Guide, in and of themselves, are sufficient to create a triable issue of fact regarding whether, in fact, there was an implied-in-fact contract to discharge only for good cause.

In support of this contention, Plaintiff relies on the California Supreme Court's decision in Guz v. Bechtel Nat'l Inc., 24 Cal. 4th 317 (2000). In Guz, the Supreme Court held that "disclaimer language in an employee handbook or policy manual does not necessarily mean an employee is employed at-will. But even if a handbook disclaimer is not controlling in every case,

neither can such a provision be ignored in determining whether the parties' conduct was intended and reasonably understood, to create binding limits on an employer's statutory right to terminate the relationship at-will." Guz, 2 Cal. 4th at 340 (citations omitted).

The Supreme Court then explained that "the more clear, prominent, complete, consistent, and all-encompassing the disclaimer language set forth in handbooks, policy manuals, and memoranda disseminated to employees, the greater the likelihood that workers could not form any reasonable contrary understanding." Id. at 317 n.11. The Court also refused to "foreclose the possibility an employer could promulgate a disclaimer clause which established beyond contrary inference that the employer intended employment to be at-will." Id.

The Guz Court ultimately concluded, however, that the specific language at issue in the employee handbook before it was ambiguous. The handbook stated that "employees have no employment agreements guaranteeing continuous service and may resign at their option or be terminated at the option of Bechtel." Id. at 328. This equivocal language, coupled with the existence of policy personnel rules, created a genuine issue of fact regarding whether the employment agreement was truly at-will:

> The specific language of [the employer's] disclaimer, stating that employees had no contracts "guaranteeing . . . continuous service" and were terminable at [the employer's] "option," did not foreclose an understanding between [the employer and all its workers that [it] would

> make its termination decisions within the limits of its written personnel rules.

Id. at 372-73 (emphasis in original). As such, there was a question of fact whether the employer had "breached a contractual obligation to follow certain procedural policies in the termination process." Id. at 348.

In this case, by contrast, the Employment Agreement contains express and unequivocal language sating that all employment at PBF is "at-will." Thus, the Court must determine whether PBF's "at-will" disclaimer language is so "clear, prominent, complete, consistent and all-encompassing" that no contrary inference can be drawn regarding PBF's intent to preclude or cause termination rights in its employees. To do so, the Court considers the entire Employee Guide, with particular emphasis on its at-will language and its disciplinary policy of warnings.

Having done so, the Court finds that the Employee Guide is sufficiently explicit in providing that employees could have their employment terminated "at-will" and "without cause" to preclude any contrary understanding on the part of employees. Indeed, the Employee Guide states not once, but twice that employment at PBF is "at-will'";

> [PBF] is an at-will employer [sic] therefore upon the companies [sic] discretion an employee may be terminated without cause.

Decl. of E. Alex Beroukhim, Exh. Q at 1.

> [T]he company reserves the right to discharge or

> demote any employee with or without cause and with or without prig notice, consistent with its policy of at-will employment.

Id. at 12. Unlike in Guz, where the employee handbook ambiguously referred to "no guarantees" and the employer's "option" to terminate employees, the PBF Employee Guide states in no uncertain terms that employment is "at-will" and that employees can be discharged "with or without cause and with or without prior notice." Indeed, Plaintiff himself concedes that the Employee Guide "contains a prominent disclaimer that employment is at-will." opposition at 25 (emphasis added). Given these prominent and unequivocal statements, Plaintiff's reliance on the Employee Guide to establish an implied agreement not to terminate except for good cause is misplaced.[6]

Moreover, Plaintiff's reliance on the Employee Guide's disciplinary policy ignores the context of the guide in which that policy appears. For example, in the same paragraph that the guide lists the reasons why an employee may be involuntarily terminated, the guide warns in clear cut terms that these specified reasons do not affect or limit PBF's right to terminate an employee with or without cause:

> Notwithstanding this last of rules, the company reserves the right to discharge or demote any employee with or without cause and with or without prior notice, consistent with its policy of at-will employment.

Decl. of E. Alex Beroukhim, Exh. Q at 1 (emphasis added).

In short, the language in the Employee Guide leads to only one possible conclusion: Plaintiff's employment was "at-will." Accordingly, he cannot maintain his claim of breach of implied-in-fact contract. Consequently, he cannot maintain his claim for breach of the covenant of good faith and fair dealing, as that claim is derivative of his breach of implied-in-fact contract claim. Guz, 24 Cal. 4th 349-350 (noting that the covenant of good faith and fair dealing „cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement").

CONCLUSION

Based on the foregoing, PBF's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

Footnotes

fn1 See Villiarimo v. Aloha Islands Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002) (noting that Ninth Circuit has refused to find a "genuine issue" where the only evidence presented is "uncorroborated and self-serving" testimony) (citing Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996); Johnson v. Washington Metro. Transit Auth., 883 F.2d 125, 128 (D.C. Cir. 1989) (discussing cases in which self-searing testimony uncorroborated by other evidence did not create a genuine issue of material fact)).

fn2 See Vasquez v. County of Los Angeles, 349 F. 3d 634, 640 n.9 (9th Cir. 2003) (citing Willis v. Marion

County Auditor's Office, 118 F.3d 542, 548 (7th Cir. 1997) (refusing to impute racial bias of subordinates who reported rule violation to superior because superior did her own independent investigation); Long v. Eastfield Coll., 88 F.3d 300, 306-07 (5th Cir. 1996) (noting that, if final decisionmaker based decision on independent investigation, causal link between subordinate's retaliatory motive and plaintiff's termination would be broken)).

fn3 In his Opposition, Plaintiff claims that Bob Herber, one of the people involved in the decision to terminate Plaintiff's employment, called Plaintiff a "stupid Korean." Opposition at 8-9. But in fact, Plaintiff conceded that Mr. Herber never called Plaintiff a "stupid Korean"; instead, Mr. Herber noted that Plaintiff did not speak English - which Plaintiff also concedes - and that Plaintiff did not know how to perform his job:

> Mr. Sleeker: This happened in 2003, you said, correct?
> THE INTERPRETER: you mean when Bob Herber told him stupid Korean?
> Mr. Bleeker: Yeah.
> Plaintiff: He didn't say "stupid Korean," but he said, "You don't speak English after so many years in the United States, and you don't even know how to do your own work." And he really embarrassed me many times, and he made me feel really bad.

Supplemental Decl. of E. Alex Beroukimn, Exh. D.

fn4 See Cornwell v. Electra Cent. Credit Union, 439

F.3d 1018, 1029 (9th Cir. 2005) ("To establish that a defendant's nondiscriminatory explanation is a pretext for discrimination, plaintiffs may rely on circumstantial evidence, which we previously have said must be `specific' and 'substantial' to create a genuine issue of material fact.") (citing Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998) ("Such [circumstantial] evidence of 'pretense' must be 'specific' and 'substantial' in order to create a triable issue with respect to whether the employer intended to discriminate on the basis of sex.")).

fn5 Plaintiff also notes that he was a long-term employee. However, longevity, raises, and promotions without specific words or conduct by the employer negating at-will employment, will not suffice to raise a triable issue of fact. Guz v. Bechtel Nat'l Inc., 24 Cal.4th 317, 338, 341-42 (2000).

fn6The court does not mean to imply that an employee guide stating that employment is at-will precludes as a matter of law a claim for implied-in-fact contract to discharge only for cause. See Harden v. Maybelline Sales Corp., 230 Cal. App. 3d 1550, 1556 (1991) ("(A)n application for employment is not a contract; it is a mere solicitation of an offer of employment. . . . A such the application cannot constitute an agreement, let alone a partially integrated agreement.") but see Wagner v. Glendale Adventist Med. Ctr., 216 Cal. App. 3d 1379 ("It follows that the 'at-will' provisions of the application are a partial integration, i.e., a complete and final expression of this term of the parties' agreement, thus precluding any evidence of a prior or contemporaneous collateral agreement at variance with or in contradiction of this term."). Instead, the Court

rests its conclusion on the fact that Plaintiff is attempting use a document that expressly, repeatedly, unequivocally, and prominently states that employment is "at-will" in order to show that, in fact, his employment was not "at-will."

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No. 06-55913
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEUNG KANG, an individual, Plaintiff - Appellant,
v.
PB FASTENERS, a Corporation doing business in California, Defendant - Appellee,
and
MERLE OGLESBY, an individual, Defendant.

ORDER

Before: Pregerson, Archer, and Wardlaw, Circuit Judges*

The panel has voted to deny appellant's petition for panel rehearing. The petition for rehearing is DENIED.

It is so ordered.

Footnote

*The Honorable Glenn L. Archer, Jr., Senior United States Circuit Judge for the Federal Circuit, sitting by designation.